EXHIBIT 3

APPELLANTS' JOINT PETITION FOR REHEARING EN BANC IN THE UNITED STATES COURT OF APPEALS

No. 09-10560

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER; MUFID ABDULQADER; ABDULRAHMAN ODEH; HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,

Defendants-Appellants.

On Appeal From the United States District Court
For the Northern District of Texas
Case No. 3:04-CR-240-4 (Jorge Solis, J.)

APPELLANTS' JOINT PETITION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER; MUFID ABDULQADER; ABDULRAHMAN ODEH,

Defendants-Appellants.

CONSOLIDATED WITH No. 08-10774

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN,

Defendant-Appellant.

CONSOLIDATED WITH No. 10-10590

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

v.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT,

Defendant-Appellant-Cross-Appellee.

CONSOLIDATED WITH No. 10-10586

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHUKRI ABU BAKER, Defendant, NANCY HOLLANDER,

Appellant.

CERTIFICATE OF INTERESTED PERSONS
UNITED STATES v. EL-MEZAIN, No. 09-10560

The undersigned counsel of record for appellant Ghassan Elashi certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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DATED: January 4, 2012

Respectfully submitted,

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STATEMENT UNDER FED. R. APP. P. 35(b)(1)

This case presents three questions of exceptional importance:

1. Did the panel apply an erroneous harmless error standard to four errors involving the admission of evidence, and thus violate appellants' Sixth Amendment right to have their guilt determined by a jury rather than by appellate judges, where it (a) viewed the evidence in the light most favorable to the government, a proper approach for reviewing sufficiency of the evidence but not for determining harmless error, (b) ignored evidence the defense presented, instead of considering the record as a whole, (c) found the errors per se harmless because they affected issues on which the prosecution presented "sufficient" or "substantial" other evidence, (d) gave no weight to the government's use of the improperly admitted evidence, including use with prosecution witnesses, in cross-examination of defense witnesses, and in closing argument, and (e) overlooked that the four errors marked the principal differences between appellants' first trial, which did not produce a single guilty verdict on any count, and the second trial, which produced guilty verdicts on all counts?

As discussed in Part I of the petition, the panel's harmless error analysis is fundamentally at odds with settled law from the Supreme Court and the courts of appeals. That is ample reason to grant rehearing. We note, however, that the Supreme Court recently granted certiorari in *Vasquez v. United States*, No. 11-199, 2011 U.S. LEXIS 8484 (Nov. 28, 2011), to determine the proper approach to deciding whether error is harmless. The decision in *Vasquez* is likely to bear upon the harmless error analysis here. The Court may wish to hold the petition until that case has been decided.

2. Did the government's presentation of an anonymous expert witness, whose name was withheld even from defense counsel, violate appellants' Fifth Amendment right to due process and Sixth Amendment right of confrontation, particularly where the government had noticed another, named expert to cover the same subject matter but elected to call the anonymous expert instead?

The panel decision upholding the government's use of the anonymous expert conflicts with *Smith v. Illinois*, 390 U.S. 129 (1968), and *United States v. Reynolds*, 345 U.S. 1 (1953), and marks the first published decision from any American court that has permitted the government (or any other litigant) to use an anonymous expert. The decision marks a dangerous erosion, in the name of "national security," of the rights the Constitution guarantees to criminal defendants. If permitted to stand, the panel decision will open the door to anonymous prosecution experts and other witnesses in any case where the government can make a plausible showing that witnesses might face a threat of violence.

The panel gave no weight to availability of the named expert as an alternative to the anonymous expert. Thus, although the panel purported to find that *national security* trumped appellants' constitutional rights, as a practical matter it concluded that *the government's preference for a particular expert* trumped those rights. For that the conclusion there is no justification.

3. Should this Court abandon the "lawful joint venture" variant of the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), because it is contrary to the language and legislative history of the rule, contravenes the directive of the Supreme Court and the Advisory Committee Notes to construe the rule narrowly, and undermines the reliability of the factfinding process?

The Court adopted the "lawful joint venture" theory in dictum in *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), without careful analysis and based on an erroneous reading of the legislative history of Rule 801(d)(2)(E). It has applied that theory several times since *Postal*, again without the rigorous consideration that such a dramatic expansion of the co-conspirator exception warrants. The lawful joint venture theory permits introduction of out-of-court statements that lack circumstantial guarantees of trustworthiness, based on the fiction that the declarant is an agent of the defendant. Particularly in light of current scholarly criticism, *see* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581 (2010), the full Court should examine and reject the lawful joint venture theory.

Undersigned counsel certify that, in our professional judgment, these issues meet the standards of Fed. R. App. P. 35 for en banc consideration.

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STATEMENT OF THE ISSUES

Appellants are three former officers of the Holy Land Foundation for Relief and Development, a former employee, and a performer at HLF fundraising events. The five men face prison terms ranging from 15 to 65 years for providing charitable support--food, school supplies, monthly stipends, and the like--to Palestinians in the West Bank through local zakat (or "charity") committees that, according to the government, Hamas controlled. There was no evidence that HLF provided funds directly to Hamas or that its funds were used (or intended to be used) to support suicide bombings or other violence. The key factual issues at trial were whether Hamas in fact controlled the zakat committees, and, if so, whether the defendants knew of the Hamas control and acted willfully.

A first trial produced a hung jury on most counts, acquittals as to one defendant, and no convictions. At a second trial, the jury returned guilty verdicts on all counts. The panel opinion affirmed the convictions in all respects, although it found four errors in the admission of prosecution evidence.

The following issues warrant en banc review:

1. Did the panel apply an erroneous harmless error standard to four errors involving the admission of evidence, and thus violate appellants' Sixth Amendment right to have their guilt determined by a jury rather than by appellate

judges, where it (a) viewed the evidence in the light most favorable to the government, a proper approach for reviewing sufficiency of the evidence but not for determining harmless error, (b) ignored evidence the defense presented, instead of considering the record as a whole, (c) found the errors per se harmless because they affected issues on which the prosecution presented "sufficient" or "substantial" other evidence, (d) gave no weight to the government's use of the improperly admitted evidence, including use with prosecution witnesses, in cross-examination of defense witnesses, and in closing argument, and (e) overlooked that the four errors marked the principal differences between appellants' first trial, which did not produce a single guilty verdict on any count, and the second trial, which produced guilty verdicts on all counts?

2. Did the government's presentation of an anonymous expert witness, whose name was withheld even from defense counsel, violate appellants' Fifth Amendment right to due process and Sixth Amendment right of confrontation, particularly where the government had noticed another, named expert to cover the same subject matter but elected to call the anonymous expert instead?

3. Should this Court abandon the "lawful joint venture" variant of the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), because it is contrary to the language and legislative history of the rule, contravenes the

directive of the Supreme Court and the Advisory Committee Notes to construe the rule narrowly, and undermines the reliability of the factfinding process?

STATEMENT OF THE CASE

Certain facts, largely unmentioned in the panel opinion, are not in dispute. The West Bank zakat committees whose charitable projects with HLF formed the foundation of appellants' convictions received funds from the United States government, through the United States Agency for International Development, during the alleged conspiracy. The United States, through USAID, *continued* to fund those committees for years after the government closed HLF and even after the indictment in this case was handed down. Those same committees received assistance from the United Nations and mainstream charities during the alleged conspiracy. And those zakat committees have never appeared on any Treasury Department list of terrorist-affiliated entities, even though HLF, *because of its charitable work with those committees,* has itself been designated a terrorist.

These undisputed facts highlight the injustice that this case represents: Five men have received lengthy prison terms for providing charity to desperately impoverished people through local committees that, until the government closed HLF in 2001, were widely regarded as among the few non-corrupt distributors of humanitarian aid in the West Bank. And those men have been sent to prison following a trial that, when the passions of the moment have cooled, no objective observer will consider fair.

I. PROCEEDINGS BELOW.

The grand jury indicted appellants July 26, 2004. 10 R.139. The indictment charged conspiracy to provide material support to Hamas, conspiracy to violate the International Emergency Economic Powers Act, and other offenses. 3 R.5011.

Trial began July 24, 2007 before the Honorable A. Joe Fish. After twenty days of deliberations, the jury returned a partial verdict on October 22, 2007. It acquitted El-Mezain on all charges except Count 1 (conspiracy to provide material support to Hamas). It initially acquitted Abdulqader on all counts, but one juror changed her mind when polled and thus the jury hung 11-1 for acquittal on all counts as to him. The jury hung on all counts as to all other appellants. 3 R.5440.

Following the partial acquittal, the case was reassigned to the Honorable Jorge Solis. The government dismissed all charges against Odeh and Abdulqader except Counts 1, 11, and 22 (conspiracies to provide material support to Hamas, to violate IEEPA, and to commit money laundering). 3 R.7034 (revised indictment).

Having failed to obtain a single guilty verdict in the first trial, the government bolstered its case for the second trial in several critical respects. First, it called at the retrial cooperating witness Mohamed Shorbagi to testify that Hamas controlled the West Bank zakat committees at issue in the case. Shorbagi did not testify in the first trial.

Second, the government persuaded Judge Solis to admit under Fed. R. Evid. 807 three documents that the Israeli military seized from the Palestinian Authority ("PA") headquarters in 2002, which characterized HLF and one of the zakat committees at issue as part of the Hamas worldwide fundraising mechanism. Judge Fish had excluded the PA documents in the first trial.

Third, the government presented Treasury Department official Robert McBrien to opine, in response to hypothetical questions, about the circumstances under which it was illegal to contribute funds to the zakat committees. McBrien did not testify in the first trial.

Fourth, the government called former National Security Council official Steven Simon to testify that the United States had a "vital strategic interest" in promoting peace between Israel and the Palestinians. According to Simon, the United States' role in promoting peace helped it remain on good terms with Arab states in the region, which was important to ensure our supply of Arab oil, to maintain military bases in Arab countries, to obtain Arab assistance in controlling Iran's nuclear proliferation, and to avoid Arab resentment that could lead to another 9/11-type attack on the United States. Simon opined that Hamas' terrorist acts interfered with the United States-backed peace process and thus jeopardized this country's interests in all of these respects. Simon did not testify in the first trial.

After deliberating nine days, the jury found appellants guilty on all counts. 3 R.7079. The district court sentenced Elashi and Baker to 65 years in prison, Abdulqader to 20 years in prison, and Odeh and El-Mezain to 15 years in prison.[1]

On appeal, the panel affirmed the convictions and sentences. Although the panel found that the district court had erred in admitting *all* of the new retrial evidence outlined above--Shorbagi's testimony about Hamas' control of the zakat committees, the PA documents, the McBrien opinions, and the Simon testimony--it found those errors harmless, individually and cumulatively, because "substantial" other evidence supported the facts in issue. Panel Opinion ("Op.") 77-94.

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[1] If appellants had been prosecuted in Israel for providing funds to Hamas, they would have received a fraction of the sentences they received here. Under Israel's Prevention of Terrorism Law, a person who "(d) gives money or money's worth for the benefit of a terrorist organisation" "shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand pounds or to both such penalties." *See* http://www.mfa.gov.il/MFA/MFAArchive/1900_1949/Prevention+of+-Terrorism+Ordinance+No+33+of+5708-19.htm. An online search reflects that sentences for providing support to Hamas without a connection to terrorist acts range from a few months to two and a half years. The prosecution in this case stood proxy in many ways--not least by presenting an anonymous Israeli intelligence agent--for the state and people of Israel as alleged victims. It is striking that the legal institutions most closely involved in protecting the victims treat the conduct alleged here so differently. This is particularly so given that the panel invokes protection of "national security" to resolve issues against appellants, without inquiring exactly what security, of what nation, is at issue.

II. STATEMENT OF FACTS.

A. HLF, the Zakat Committees, and the Designation Process.

Baker founded HLF in 1988. 4 R.4189, 4198. He served on the HLF board, as secretary, and as chief executive officer until the government closed the charity in December 2001. 4 R.4198, 4201. Elashi joined the HLF board in the late 1980s and served at times as secretary, chief financial officer, treasurer, and chairman. 4 R.4191, 4193, 4195, 4201. El-Mezain joined the HLF board in the late 1980s and served for a period as chairman and president. 4 R.4191, 4193. He stepped down as chairman in 1999 and opened HLF's San Diego office. 4 R.4201. Odeh ran HLF's New Jersey office from early 1994 until the organization closed. 4 R.4201-05. Abdulqader belonged to a band that performed at HLF events (among other places), and he sometimes served as a volunteer for the organization. 4 R.4325-35.

Although HLF distributed humanitarian aid in the United States and other countries, its primary mission was providing assistance to Palestinians living under Israeli occupation in the West Bank and Gaza. According to Edward Abington, the former United States Consul General in Jerusalem, HLF had a "good reputation" for "low overhead costs and for projects of assistance that went to needy Palestinians." 7 R.9186. No one disputed the humanitarian crisis that HLF sought to alleviate; even prosecution expert Matthew Levitt recognized the plight of the Palestinians as "desperate." 4 R.3863-67.

As relevant here, HLF distributed humanitarian aid to Palestinians through local West Bank charitable organizations known as zakat committees. The government did not contend that HLF provided funds directly to Hamas or that its funds were used (or intended to be used) to support suicide bombings or other violence.[2] Rather, the government's theory was that Hamas controlled the zakat committees that HLF used and that by distributing aid through those committees, HLF helped Hamas win the "hearts and minds" of the Palestinian people.

In 1987, Palestinians revolted against the Israeli occupation in an uprising known as the first Intifada. Hamas emerged during the Intifada as a popular offshoot of the Muslim Brotherhood, an Islamic organization founded in Egypt in 1927. Hamas' main political rival was Fatah, a secular organization headed by Yasser Arafat. Hamas resisted the occupation at first through small-scale violence directed against Israeli soldiers. By the mid-1990s, however, Hamas had conducted several suicide attacks against Israeli civilians inside Israel.

In September 1993, Arafat and Yitzhak Rabin, Prime Minister of Israel, signed what became known as the Oslo accords. The accords contemplated the creation of a limited Palestinian governing authority. Many Palestinians opposed the accords, believing they did not go far enough in establishing Palestinian sovereignty. Hamas was among the Palestinian organizations that opposed the Oslo accords. Under the accords and follow-on agreements, the PA was created and given power to administer some aspects of portions of the West Bank and Gaza. Throughout the period at issue, Fatah controlled the PA.

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[2] *E.g.*, 7 R.9424 (government closing: "No one is saying that the defendants themselves have committed a violent act" or that the HLF funds went directly to buy a suicide belt or bomb).

In October 1993, soon after the Oslo accords, Baker, Elashi, and other prominent American Muslims met at a hotel in Philadelphia. The FBI secretly recorded the meeting. The attendees discussed a range of subjects, including their opposition to the accords, the role of Hamas in resisting the Israeli occupation, and HLF's function in providing assistance to the Palestinian people. Baker emphasized that HLF "must act as an American organization which is registered in America and which cares for the interests of the Palestinian people. It doesn't cater to the interests of a specific party. Our relationship with everyone must be good, regardless." 7 R.5380. Baker declared that HLF "must stay on its legal track as far as charitable projects are concerned without going after a sentiment that could harm the foundation legally . . . ." 7 R.5381. He added: "We shouldn't take part in any illegal transactions." 7 R.5382.

The United States first banned financial support for Hamas on January 25, 1995, more than a year after the Philadelphia meeting, when President Clinton issued Executive Order 12947. 60 Fed. Reg. 5079 (Jan. 25, 1995).[3] The Executive

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[3] Thus, the earliest unlawful conduct alleged in the indictment is January 25, 1995. 3 R.7055, 7060. It was undisputed that appellants' conduct before that date

Order implemented the ban by naming Hamas a Specially Designated Terrorist ("SDT"). 7 R.7283, 7301. E.O. 12947 gave the Treasury Department authority to designate additional SDTs, including "persons determined . . . to be owned or controlled by, or to act for or on behalf of, any of the foregoing persons," including Hamas. E.O. 12947, § 1(a)(iii), 60 Fed. Reg. at 5079; 7 R.7301-02. According to evidence at trial, the designation of an entity "alert[s] the world to [its] true nature" and "cut[s] it off from the U.S. financial system." DX 1052; 7 R.7306.[4]

Beginning with the designations of Hamas and others in January 1995, the Treasury Department maintained a public list of all designated persons and entities, including SDTs and FTOs. 7 R.7277-78, 7302. The list included persons and entities designated because they were determined to be "owned or controlled by, or to act for or on behalf of" Hamas. 7 R.7305. Hamas and several Hamas officials appeared on the Treasury Department list. But the government never designated as an SDT or FTO (and placed on the list) any of the zakat committees, or anyone

(continued...)

did not violate any federal criminal law. As the government conceded in its opening statement, "[I]t didn't become illegal to support Hamas or to fund Hamas until 1995." 4 R.3563.

[4] The United States further criminalized financial support for Hamas on October 8, 1997, when the State Department designated it a Foreign Terrorist Organization ("FTO") and thus brought it within the prohibitions of 18 U.S.C. § 2339B. Because El-Mezain was acquitted in the first trial on all counts but the conspiracy to violate § 2339B (Count 1), October 8, 1997 marked the earliest date on which his conduct could be found unlawful.

connected with the zakat committees. 4 R.3860-62; 7 R.7344. The Treasury Department thus never "alert[ed] the world" that those committees were "owned or controlled by, or . . . act[ed] for or on behalf of" Hamas.[5]

In February 1995, shortly after E.O. 12947 designated Hamas an SDT, Elashi (on behalf of HLF) and representatives of other American Muslim organizations met at the Treasury Department in Washington, D.C. with the head of the Office of Foreign Assets Control ("OFAC") and other Treasury officials. HLF and the other organizations sought guidance on "the new executive order and its implications for charitable giving by American Muslims." 7 R.7298, 7312-15. The Treasury officials responded that the Department "was not going to make a determination for them as to who they could or couldn't send money to beyond the entities already listed in Executive Order 12947." 7 R.7315. The Department declined to provide a list of approved entities--a so-called "white list." 7 R.7352-54. The Treasury officials referred Elashi and the other attendees to a White House press release about E.O. 12947, which stated that the Executive Order was "intended to reach charitable contributions to *designated organizations* to preclude diversion of such donations to terrorist activities." GX OFAC 4 (emphasis added);

[5] The Treasury Department indisputably has the authority and the ability to designate zakat committees as SDTs. In August 2007, for example, Treasury designated the al-Salah Society--a Gaza zakat committee--as an SDT based on its relationship with Hamas. DX 1052; 7 R.7342. Treasury also separately designated a number of Hamas leaders. 7 R.7342-43.

see 7 R.7319-20. As noted, the West Bank zakat committees were not among the "designated organizations."

In a call the government secretly recorded on April 23, 1996, Baker and Elashi discussed the possibility that the Treasury Department might designate and list the zakat committees. Baker emphasized that if Treasury placed the committees on the list, HLF could no longer distribute charity through them. GX Baker Wiretap 11; 7 R.7053-56. Baker told Elashi that if the committees were designated, "[Y]ou have to abide by the law," and Elashi--though determined to speak out publicly against any such designation--responded, "Well, I'm gonna abide by the law because I won't be able to make a transfer. I know that." 7 R.7504-05. Even after this conversation, which the FBI reviewed around the time it occurred, the government did not designate the zakat committees.

Reports appeared occasionally in the media that the government was investigating HLF for supporting Hamas. 7 R.8498. In late 1997, HLF retained lawyer (and former Congressman) John W. Bryant to address the reports with the government. 7 R.8497. In 1998 and 1999, Bryant met with officials from the State Department, the FBI (on three occasions), and the Israeli Embassy. In each instance, he asked if HLF should do anything differently. No one cautioned him that HLF should not deal with the zakat committees. 7 R.8498-8505.

In early December 2001, the Treasury Department designated HLF a terrorist organization, seized its assets, and put the charity out of business.

B. The Evidence Concerning the Zakat Committees.

At trial, the government sought to show in several principal ways that Hamas controlled the West Bank zakat committees and that appellants knew of the Hamas control. First, it produced an anonymous expert, "Avi," who claimed to be a lawyer from the Israeli Security Agency ("ISA"). Neither the defense nor the jury learned Avi's true name. Avi opined, based on criteria he selected, that Hamas controlled the committees named in the indictment. *E.g.*, 7 R.7998-8008.

Second, the government presented the testimony of Shorbagi, who had been caught committing a massive fraud (unrelated to HLF) against his employer and had pled guilty. Shorbagi had never been to the West Bank, and he had not been to Gaza since 1991. 7 R.6620-27, 6808-09. Nonetheless, he testified over objection, based on what he had read on the internet and in newspapers and leaflets and heard in conversation with friends, that Hamas controlled four of the West Bank zakat committees at issue. 7 R.6746-48, 6776, 6798.

Third, the government offered the three PA documents that (according to an Israeli military officer who testified under a pseudonym) the Israeli military seized in 2002 during an incursion into the West Bank. GX PA 2, 8, 9. The documents purported to describe the Hamas fundraising network, and identified HLF and the Ramallah Zakat Committee as parts of that network.

Fourth, the government relied on documents seized from the homes of two men--Ismail Elbarasse and Abdel Haleem Ashqar--neither of whom worked for HLF. *E.g.*, GX Elbarasse Search 22; GX Ashqar Search 5. All of the documents predated the designation of Hamas in 1995. According to the government's interpretation of those documents, they showed the authors' belief that HLF was a fundraising arm of Hamas and Hamas controlled certain of the West Bank zakat committees. The district court admitted the documents under the so-called "lawful joint venture" variant of the co-conspirator exception to the hearsay rule.

Finally, the government pointed to ambiguous comments at the 1993 Philadelphia meeting (in which persons other than Baker and Elashi referred to some of the West Bank zakat committees as "ours"), to the fact that some persons associated with the committees were identified as Hamas adherents, and to other documents as evidence that Hamas controlled the committees. *E.g.*, 7 R.7051-54, 7129, 7145-46; GX Philly Meeting 13.

The defense vigorously disputed the government's contention that Hamas controlled the zakat committees at issue and that appellants knew of any such control. To the extent they could without knowing Avi's true name, defense counsel attacked his credibility on cross-examination. Counsel also challenged the credibility of other key government witnesses, including Levitt and Shorbagi. And the defense called (among other witnesses) Edward Abington, who served as the United States Consul General in Jerusalem from 1993 to 1997--the de facto United States ambassador to the PA. 7 R.9123, 9126-27. Abington served thirty years as a foreign service officer, from 1970 through 1999, and before that he worked for the CIA. 7 R.9124-25. He testified that as Consul General he visited the West Bank zakat committees (the only trial witness to do so) and received regular briefings about Hamas. He never heard of any link between Hamas and the committees. 7 R.9164-65, 9193, 9231-32, 9302-03.

The defense elicited other facts that tended to undermine the prosecution's theory that Hamas controlled the zakat committees. Most of the committees predated Hamas, some by decades. The committees were licensed and audited throughout their existence by the entity governing the West Bank--Jordan before 1967, the Government of Israel ("GOI") from 1967 until the 1993 Oslo accords, and the PA thereafter--all of which were bitter enemies of Hamas. *E.g.*, 7 R.7471-89, 7560-68, 9185; DX1065, 1070; GX InfoCom Search 28. And USAID--which had strict instructions not to deal with Hamas--provided funds over many years to zakat committees named in the indictment, including the Jenin, Nablus, and Qalqilia committees. 7 R.9168-73, 9180-85; DX102, 1074, 1076. That USAID funding continued after the government closed HLF and even after the indictment in this case. 7 R.9183-85; DX1076. In 2004, for example, the year HLF was indicted, USAID provided $47,000 to the Qalqilia zakat committee. DX1074.

ARGUMENT

I. THE EN BANC COURT SHOULD DETERMINE THE CORRECT APPROACH TO ASSESSING HARMLESS ERROR.

The panel found that the district court committed four errors in admitting prosecution evidence. But it found all the errors harmless, individually and cumulatively, based on a profoundly flawed analysis that the Supreme Court will review this Term in *Vasquez*.

A. The Errors.

1. **Shorbagi.**--Shorbagi was born in the Gaza Strip and lived there until he was eighteen. In 1982, he moved to the United States, where he has lived ever since, with occasional visits to Gaza. Shorbagi has never been to the West Bank, where all of the zakat committees at issue in this case are located. His last visit to Gaza was in 1991, more than four years before the first transaction alleged in the indictment. 7 R.6620-27, 6794-98, 6808-09.

Over objection, the district court permitted Shorbagi to testify that Hamas controlled four of the West Bank zakat committees through which HLF made charitable donations. 7 R.6746-48, 6776, 6798. The panel found the district court abused its discretion in admitting this testimony, because it was based on hearsay--what Shorbagi had read on the internet and in newspapers and leaflets and heard in conversation with friends--and Shorbagi lacked personal knowledge of the alleged facts at issue. Op. 27.

The prosecution cited Shorbagi's testimony repeatedly in closing. *E.g.*, 7 R.9489, 9492, 9495, 9499-9501, 9741-42. It argued that Shorbagi "of course" would know the facts to which he testified because "this is where he is from. He is the exact type of local population that Hamas would target when they want certain people to know who they were and certain people not to know." 7 R.9489.

2. The Palestinian Authority Documents.--Over objection, Judge Solis reversed Judge Fish's ruling from the first trial and admitted for their truth under Fed. R. Evid. 807 three documents that the Israeli military seized from PA headquarters in Ramallah in 2002. GX PA 2, 8, 9; 7 R.6888. The panel found that Judge Solis abused his discretion in admitting the PA documents. Op. 28, 34.

GX PA 2 is an undated memorandum titled "Who is financing Hamas." The memorandum purports to detail Hamas' worldwide funding. Under the heading "Hamas Financial Resources Worldwide," it lists "The Holy Land Fund" located in Texas. GX PA 2 at 5. The memorandum asserts that "Hamas collects approximately 10% of its force [from the United States] through donations, and the sale of newspapers and Zakat funds." GX PA 2 at 4. It declares that five percent of the funds provided to Hamas go for weapons and explosives and the remainder is used for Hamas' social network, including day care centers, schools, medical facilities, sports teams, and "mosque committees." *Id.*

GX PA 8 is a document dated May 22, 2000. The translated portion discusses the Ramallah Zakat Committee--the zakat committee at issue in a number of counts. The document asserts that "[t]he most important active members" of the committee are all associated with Hamas. GX PA 8 at 32. It adds that "[t]hrough our follow up, it was determined that the committee transfers funds from overseas to Hamas." *Id.*

GX PA 9 is a December 22, 2001 memorandum on PA Palestinian General Security letterhead signed by Major Khalid Abu-Yaman, as "Director of Operations." It too discusses the Ramallah Zakat Committee and asserts that "[o]fficials and members of this committee are associated with Hamas Movement and some of them are activists in the Movement." GX PA 9 at 2.

The government argued to the district court that "[t]he materiality and importance of the [PA documents] is self-evident. . . . [T]he seized PA documents will demonstrate that the governing Palestinian body at the time . . . understood that the zakat committees at issue were affiliated with Hamas." 3 R.5154-55.[6] In

[6] The government made this argument in support of its contention--essential for admissibility under Rule 807--that the PA documents are "more probative on the point for which [they were] offered than any other evidence" that the government could obtain through reasonable efforts. Fed. R. Evid. 807(B). That assertion stands in stark contrast to the government's claim in this Court that the error in admitting the documents was harmless.

keeping with the documents' "self-evident . . . importance," FBI Agent Lara Burns discussed GX PA 2, 8, and 9 in her testimony on redirect and read substantial portions of them aloud to the jury. 7 R.7736-48. "Avi" referred to the PA documents in his testimony. 7 R.8001-02, 8119-8124. The government used them to cross-examine former Consul General Abington. 7 R.9287-92. And the prosecution emphasized the documents in closing argument. 7 R.9454-55, 9501. It assured the jury that "[t]here is another government"--the PA--"that identified the same organizations as being part of Hamas." 7 R.9454.

3. McBrien's Opinions About the Law.--A key issue at trial was the significance of the Treasury Department's failure to list the West Bank zakat committees as SDTs or FTOs. To address this point, the government called OFAC official McBrien to testify.

Over repeated objection, McBrien offered his interpretation of E.O. 12947 and an OFAC regulation that implemented the Executive Order, 31 C.F.R. § 595.408. Referring to the al-Salah Society, a Gaza charitable society that OFAC designated in 2007, the government asked McBrien:

> Q. . . . It says al-Kurd's [an official of al-Salah] affiliation with Hamas goes back over a decade. So let's say that in 2001, for example, somebody wanted to give money to the al-Salah Society. Okay? Would that have been okay because the al-Salah Society is not listed on the SDN or the SDT list?
>
> A. If they had no knowledge and no reason to know, it would not have been prohibited.

Q. And if they had a reason to know that Ahmad al-Kurd and the al-Salah Society were connected to Hamas, would that have been okay?

MR. CLINE: Your Honor, I object to the legal opinion and also to expert opinion from someone who hasn't been designated.

THE COURT: Overruled. You may answer.

THE WITNESS: Would you repeat the last question, please?

Q. Yes. If someone knew that the al-Salah Society and Ahmed al-Kurd were connected to Hamas, but al-Salah and Ahmad al-Kurd were not listed on the SDT list, would it have been okay to give to Ahmad al-Kurd or the al-Salah society?

A. No, it would not. It would be prohibited.

7 R.7290-91. This was an improper expert opinion on one of the core legal issues in the case. It was particularly damaging because HLF had provided funds to the al-Salah Society before its designation, and McBrien's testimony thus amounted to an opinion that HLF had violated the law.

The government then asked McBrien:

Q. Does the designation list give someone a blank check to give to any organization it wants as long as it is not on the list?

A. No.

Q. What is the test for whether you can give to someone or someplace that is not on the designation list itself?

MR. DRATEL: Your Honor, I object to the legal question.

THE COURT: Overruled. He may answer that. Go ahead.

THE WITNESS: The basic test is, is the entity or the individual owned or controlled by or acting for or on behalf of the designated entity or the designated organization. To make that in a simpler way

> of describing that, it means are you acting as an intermediary for them, are you acting as their front organization, are you their straw man, are you their go between. And it doesn't matter whether the organization set itself up that way or if a person who wants to contribute to the prohibited party to the SDT finds someone to fulfill that role. It is still a prohibited situation.

7 R.7293-94. This testimony provided the jury the "test"--that is, the *legal standard*--for the necessary connection between a non-designated entity and a designated entity.

The government next elicited from McBrien that the "test" he had described was "embodied . . . within OFAC's regulations." 7 R.7294. Over objection, it introduced a copy of § 595.408 (GX OFAC 5) and had McBrien read it to the jury. 7 R.7295-96. On redirect, it had McBrien repeat his legal opinions several times. 7 R.7357, 7358, 7361-62.

. McBrien's testimony improperly gave the jury the "test" for determining if HLF's transfers to the zakat committes were "illegal" or "prohibited," and he applied that "test" to al-Salah and to hypothetical facts that the government tailored to its view of the evidence. He adopted the government's paraphrases of the actual language of E.O. 12947, such as "connected to"; he suggested that a person violated the law not only when he *knew* a non-designated entity was "connected to" Hamas, but when he had "reason to know," thus reducing the mens rea required for conviction; and he offered his own gloss on the Executive Order. 7 R.7293-94

("[I]t means are you acting as an intermediary for them, are you acting as their front organization, are you their straw man, are you their go between.").

The panel concluded that the district court abused its discretion in admitting McBrien's opinions about the law. Op. 53-54.

4. Simon's Testimony About United States Interests.--On its second trial witness list, the government included Steven Simon, who served on the National Security Council staff under President Clinton. 7 R.6254-55. The government offered Simon to "testify about the reasons why Hamas was designated as a terrorist organization by the United States Government." 3 R.6544. It explained that the testimony was relevant "because it is important for the jury to understand why the United States has an interest here. A terrorist organization has a focus on a geographic region that is far away from the United States, and it is important for [the jurors] to be able to tie the concerns that animated the designation of Hamas so that they understand why this case is relevant to them." 3 R.6109. The district court overruled defense objections to Simon's testimony.

Simon left no doubt in the jurors' minds why this prosecution was "relevant to them." He opined that the United States had a "vital strategic interest" in promoting peace between Israel and the Palestinians. According to Simon, the United States' role in promoting peace helped it remain on good terms with Arab states in the region, which was important for several reasons: to ensure our supply of Arab oil, to maintain military bases in Arab countries, and to obtain Arab assistance in controlling Iran's nuclear proliferation. Simon opined that Hamas' terrorist acts interfered with the United States-backed peace process and thus jeopardized our interest in winning Arab support. 7 R.6259-65.

The government concluded Simon's direct examination with this question: "Why is it that we in the United States should care about an organization like Hamas that is trying to undermine the Middle East peace process?" 7 R.6265. Simon responded in part: "The problem now, and we all know this since 9/11, is not just that the U.S. has powerful interests in maintaining a secure supply of oil, but we now know that people from there who are angry at the United States are motivated and capable of coming over here and hurting us quite badly. . . . So, you know, *to the extent that the United States can remove one cause of resentment against America, we reduce the threat against the United States correspondingly*." 7 R.6266 (emphasis added).

Simon's testimony managed to "tie the concerns that animated the designation of Hamas" (3 R.6109) to fears that now dominate American life: fear about the fragile oil supply, fear about nuclear weapons in the hands of religious fanatics, fear about the security of our military, and fear about the threat of another terrorist attack on this country. The clear implication of Simon's testimony was that appellants, by opposing the Oslo accords and allegedly supporting Hamas, placed Americans at risk on all these fronts.

At the conclusion of Simon's testimony, the defense made--and the district court denied--a motion for mistrial. 7 R.6282-83. The panel found that the district court abused its discretion in admitting Simon's testimony. Op. 61.

B. The Panel's Harmless Error Analysis.

The panel found all of these errors harmless, individually and cumulatively.[7] The panel's harmless error analysis is deeply flawed in crucial respects and violates appellants' Sixth Amendment right to trial by jury.

First, the panel "view[ed] the evidence in the light most favorable to the verdict." Op. 8. That approach is appropriate when considering a challenge to the sufficiency of the evidence; it is absolutely wrong when determining whether an error is harmless. *See, e.g., United States v. Hands*, 184 F.3d 1322, 1330 n.23 (11th Cir. 1999) ("Harmless error review, unlike a determination of the sufficiency of the evidence, does not require [the Court] to view witnesses' credibility in the light most favorable to the government.").[8] As an example of this error, the panel justified withholding Avi's name from the defense (*see* Part II below) in part on the ground that appellants had ample opportunity to attack his testimony as biased, Op. 20-21, but for harmless error purposes it treated that testimony as if it were unchallenged, *e.g.*, Op. 85-93. The panel made similar errors in assessing the testimony of Shorbagi and Levitt, both of whom were heavily impeached, and in evaluating the government's other evidence.

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[7] Appellants argued that the cumulative effect of the errors "yield[ed] a denial of the constitutional right to a fair trial." *United States v. Valencia*, 600 F.3d 389, 429 (5th Cir.) (quotation omitted), *cert. denied*, 131 S. Ct. 285 (2010); *see, e.g., United States v. Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978).

[8] *See also, e.g., United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (error prejudicial where government's case relied on cooperators, whose credibility the jury had "ample reason . . . to question"); *United States v. Manning*, 23 F.3d

Second, the panel violated the rule that harmless error review must be based on "the record as a whole," not merely those portions that favor the government. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *see, e.g., Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949) (considering entire record and finding that erroneous admission of hearsay was not harmless).[9] The panel considered only the government's evidence in its harmless error analysis; it gave no weight to (and barely mentioned) the substantial defense evidence. Op. 77-94. That defense evidence included, for

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(continued...)

570, 575 (1st Cir. 1994) (given that prosecution and defense witnesses both "gave a plausible account," neither of which was "*inherently* unlikely to be true . . . and given the further fact that we are precluded from making independent credibility determinations on appeal," error cannot be found harmless (emphasis in original)).

[9] *See also, e.g., Hands*, 184 F.3d at 1329 ("We determine whether an error had substantial influence on the outcome by weighing the record as a whole . . . ."); *Taylor v. United States*, 414 F.2d 1142, 1144-45 (D.C. Cir. 1969) (rejecting government contention that on harmless error review the court should view the evidence in the light most favorable to the government; harmless error analysis requires court to "look to all the evidence, defense and prosecution alike, and bring our judgment to bear upon the question of whether it is clear to us" that the error was harmless).

example, testimony from former Consul General Abington, former Congressman Bryant, Professor John Esposito, and former HLF controller Mohammad Yaish, evidence of USAID funding of a number of the zakat committees at issue, and documentary evidence and testimony elicited on cross-examination of prosecution witnesses--none of which the panel considered in assessing harmlessness.[10]

Third, the panel focused its harmless error review on the sufficiency of the properly admitted evidence to support the facts in dispute. *E.g.*, Op. 79 ("It is well established that error in admitting evidence will be found harmless when the evidence is cumulative, meaning that substantial evidence supports the same facts and inferences as those in the erroneously admitted evidence."). That too is wrong. The inquiry is *not* "merely whether there was enough [evidence] to support the result apart from the phase affected by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see id.* at 767 (rejecting argument that error is harmless "if the evidence offered specifically and properly to convict [the] defendant would be sufficient to sustain his conviction" absent the error); *Fratta v. Quatermain*, 536 F.3d 485, 510 (5th Cir. 2008) (same); *Hands*, 184 F.3d at 1329 (same).

Finally, the panel ignored critical circumstances which show a substantial likelihood that the errors affected the jury's verdict. Most significantly, each of the

[10] The panel devotes one paragraph to what it calls "[t]he defendants' theory at trial," Op. 15, but it does not address the testimony of any of these witnesses or otherwise consider the defense evidence.

erroneously admitted pieces of evidence marks a key difference between the first trial, at which there was not a single guilty verdict for *any* defendant on *any* count, and the second trial, at which *all* defendants were found guilty on *all* counts.[11] In addition, the panel gave little weight to the use the government made of the erroneously admitted evidence at trial, including in the examination and cross-examination of witnesses and in closing argument.[12] The panel ruling thus permits the government to rely on inadmissible evidence at trial, then turn around on appeal and deride the significance of that very evidence by pointing to the rest of its case. The panel also overlooked the fact that the jury deliberated *nine days* before returning its verdict--a strong signal that *it* did not view the evidence as overwhelming, even *with* the erroneously admitted evidence. *See, e.g., Krulewitch*, 336 U.S. at 444-45 (rejecting harmless error argument in part because of evidence that the jury had difficulty reaching its decision).[13]

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[11] *See, e.g., Kennedy v. Lockyer*, 379 F.3d 1041, 1056 & n.18 (9th Cir. 2004) (gang testimony was excluded at first trial, which resulted in mistrial, and admitted at the second trial, which resulted in conviction; court concludes that error in admitting the evidence was prejudicial).

[12] The panel acknowledges in a single sentence that "during questioning and in its closing argument the Government highlighted some of the evidence that we have found to be erroneously admitted, but we believe that the other evidence was formidable." Op. 93 (quotation omitted).

[13] *See also, e.g., United States v. Varoudakis*, 233 F.3d 113, 126 (1st Cir. 2000) (longer jury deliberations "weigh against a finding of harmless error," because "[l]engthy deliberations suggest a difficult case"); *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) ("The state's case against [the defendants] is a strong

By giving no weight to these circumstances and committing the other errors outlined above, the panel violated the fundamental tenet of harmless error review: "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *see, e.g., United States v. Cornett*, 195 F.3d 776, 785-86 (5th Cir. 1999) (applying *Sullivan* and declining to find evidentiary error harmless). In other words, an appellate court must assess the potential impact of the error on the jury that actually decided the case; it may not speculate on how a hypothetical jury would decide an error-free trial. By effectively substituting itself as the factfinder, the panel violated appellants' Sixth Amendment right to have their guilt determined by a jury rather than by appellate judges.

C. *Vasquez.*

As we have shown, the panel's harmless error analysis contravenes settled case law from the Supreme Court and the courts of appeals. That is reason enough to grant rehearing. We note, however, that the Supreme Court recently granted certiorari in *Vasquez v. United States*, No. 11-199, 2011 U.S. LEXIS 8484 (Nov.

(continued...)

one. Nevertheless, if the jury had readily accepted [the] eyewitness testimony, it seems unlikely they would have deliberated so long to reach a verdict.").

28, 2011).[14] *Vasquez* presents two important questions concerning harmless error review in federal criminal cases. Those issues are:

> Did the Seventh Circuit violate [the Supreme] Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all?
>
> Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case?

The harmless error arguments here divide along the lines of the alternatives the Supreme Court will address in *Vasquez.* Relying solely on the prosecution evidence, and viewing it in the light most favorable to the verdict, the panel found the district court's four errors harmless, because (in its view) the properly admitted prosecution evidence was "substantial." *E.g.*, Op. 94. By contrast, appellants dispute the strength of the government's evidence, and they focus on the effect of the errors on the jury that decided the case in light of the entire record considered de novo, as shown by the difference in outcome between the first and second trials, by the government's emphasis on the improper evidence in examining witnesses and in closing argument, and by the length of the deliberations.

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[14] Appellants brought *Vasquez* to the panel's attention on December 6--the day before the opinion was filed--through a letter under Fed. R. App. P. 28(j).

If the Supreme Court accepts the petitioner's view in *Vasquez*, the panel's harmless error analysis will certainly need to be revisited. For that reason, the Court may wish to hold this petition until the *Vasquez* decision issues.

II. THE EN BANC COURT SHOULD CONSIDER WHETHER, AND UNDER WHAT CIRCUMSTANCES, THE GOVERNMENT MAY PRESENT AN ANONYMOUS EXPERT WITNESS.

Over defense objection, the district court permitted the government to present an anonymous expert witness, who testified under the pseudonym "Avi."[15] The court barred the defense from eliciting the witness' name on cross-examination. It refused to order disclosure of his name even to defense counsel, all of whom had security clearances, an obvious need to know the information, and access to a secure room in which to store and work with classified information. The district court permitted the government to present the anonymous expert even though it had noticed another, named expert--Colonel Jonathan Fighel, a retired Israeli military officer--to cover the same subjects as Avi.

The panel affirmed the district court's ruling, finding that the government's interest in national security outweighed appellants' interest in knowing the name of the government's key expert. Op. 16-22. The panel gave no weight to Col. Fighel's availability as an alternative expert. Thus, although the panel purported to find that *national security* trumped appellants' constitutional rights--a holding at

[15] The district court also permitted the government to present a significant foundational witness under a pseudonym ("Major Lior"). Although we maintain that ruling was constitutional error, we focus here on the anonymous expert.

war with Supreme Court precedent, as we discuss below--as a practical matter it concluded that *the government's preference for a particular expert* trumped those rights. For that conclusion there is no justification.

The panel ruling marks the first published decision from any American court upholding the prosecution's use of an anonymous expert. The decision cannot be reconciled with the Supreme Court's landmark decisions in *Smith v. Illinois*, 390 U.S. 129 (1968), and *United States v. Reynolds*, 345 U.S. 1 (1953).[16] If permitted to stand, it will lead inexorably to anonymous prosecution witnesses in any case involving a threat of potential violence, even when (as here) the threat does not emanate from the defendants themselves.[17]

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[16] The prosecution use of anonymous witnesses has commanded the attention of courts and scholars beyond this country's borders, including international criminal courts. *See, e.g., Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, UN Doc. IT-94-1-T (International Criminal Tribunal for the Former Yugoslavia, Aug. 10, 1995); Natasha A. Affolder, *Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int'l L. 445 (1998); Monroe Leigh, *Witness Anonymity Is Inconsistent With Due Process*, 91 Am. J. Int'l L. 80 (1997); David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 Sydney L. Rev. 361 (2002); Joanna Pozen, *Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials*, 38 N.Y.U. J. Int'l L. & Pol. 281 (2005-2006). In light of this continuing debate, the Court's decision will carry even greater influence than usual.

[17] As one commentator observed: "A further, very real, danger associated with the acceptance of any degree of witness anonymity is the proclivity for what start out as exceptional procedures to become 'normal' features of the prosecution process." Lusty, *supra* note 16, 24 Sydney L. Rev. at 425.

A. Background.

Before the first trial, the government moved for leave to present an expert witness from the ISA under a pseudonym, and to withhold his true name from the defense, including both the defendants themselves and defense counsel. Judge Fish granted the government's motion on the basis that the expert's name was classified and disclosure of his identity could place him or his family in danger. 10 R.4279, 4284-86; 2 R.4917.[18] At the first trial, "Avi" testified using his pseudonym. The government did not call Col. Fighel.

Before the second trial, the defense moved for disclosure of Avi's name. 29 R.6364, 6366-70. Judge Solis denied the motion. The court found the name "relevant" but declined to find it "material," because the defense could not specify the evidence it would discover if the name was disclosed. 32 R.149-53. The court further held that, even if the defense could establish materiality, the "balance of equities lies in the Government's favor; Defendants' interest in obtaining the names of the witnesses is outweighed by the Government's need to keep the information secret." *Id.* at 152-53. The district court gave no weight, in balancing the "equities," to Col. Fighel's availability.

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[18] Avi's identity was classified because it constitutes "foreign government information"--that is, information provided by Israel to the United States government "with the expectation that the information [is] to be held in confidence." Exec. Order 13292, §§ 1.1(c), 1.4(b), 1.6(e), 6.1(r), 68 Fed. Reg. 15315, 15317, 15318, 15331 (Mar. 28, 2003); *see* 10 R.4284-86.

Avi testified at the second trial, as he had at the first, using his pseudonym. As before, neither the defense nor the jury learned his true name. He was the government's principal expert witness linking the zakat committees to Hamas. The government again elected not to call Col. Fighel.

B. Appellants Had a Fifth and Sixth Amendment Right to Know the Name of the Principal Expert Witness Against Them.

In *Smith*, the trial court permitted an informant to testify under an assumed name, much as "Avi" did here, and it sustained objections to questions about the witness' true name and address. The Supreme Court reversed the conviction. The Court observed that "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation." 390 U.S. at 131 (footnote omitted).

Since *Smith*, no published decision has permitted an expert witness in a criminal case to testify for the prosecution anonymously.[19] Although courts have

[19] An unpublished Fourth Circuit decision, issued after the second trial in this case, affirmed a district court's order permitting an expert witness to testify without disclosing his name to the defense. *United States v. Zelaya*, 336 Fed. Appx. 355, 357-58 (4th Cir. 2009) (unpublished), *cert. denied*, 130 S. Ct. 2341 (2010)). From the brief description of the facts in the Fourth Circuit opinion, there appear to be differences between *Zelaya* and this case. For example, the defendants in *Zelaya* were members of the MS-13 gang involved in acts of extreme violence, and thus might be deemed to have forfeited their right to know the witness' name. Appellants here, by contrast, had neither participated in nor

on rare occasions permitted the prosecution to present *fact* witnesses without requiring disclosure of their names in open court, in most of those cases the witness' name has been disclosed at least to defense counsel so that an adequate investigation of the witness' credibility can be undertaken. *See, e.g., United States v. Celis*, 608 F.3d 818, 829-33 (D.C. Cir. 2010); *United States v. Maso*, 2007 U.S. App. LEXIS 25255, at *8-*13 (11th Cir. Oct. 26, 2007) (unpublished); *Siegfriedt v. Fair*, 982 F.2d 14, 17-19 (1st Cir. 1992); *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1992); *United States v. Fuentes*, 988 F. Supp. 861, 863-67 (E.D. Pa. 1997); *Alvarado v. Superior Court*, 5 P.3d 203, 218 (Cal. 2000).[20]

The same constitutional concerns that led these courts to require disclosure of witnesses' true names to the defense exist here. Without Avi's name, the defense could not investigate him. As Avi put it on cross, "You cannot research me." 7 R.8272. For example, the defense could not present opinion and reputation

(continued...)

advocated violence. More fundamentally, *Zelaya* makes the same error as the district court and the panel here; it subordinates the defendant's constitutional rights to government security interests and thus contravenes *Smith* and *Reynolds*.

[20] One district court permitted several ISA agents to testify anonymously at trial about obtaining a confession from the defendant. *See United States v. Salah*, 412 F. Supp. 2d 913, 923-24 (N.D. Ill. 2006) (suppression hearing testimony); *id.*, Minute Order (N.D. Ill. Aug. 29, 2006) (trial testimony). For the reasons stated in text, *Salah* was wrongly decided. In addition, the case is distinguishable in at least two respects. First, none of the ISA agents in *Salah* testified as an expert. Second, Salah himself had dealt with the agents face to face during his detention in Israel and thus presumably had at least some information about them. Appellants had no contact with Avi other than seeing him in court.

evidence about Avi's character for untruthfulness, *see* Fed. R. Evid. 608(a); *Alford v. United States*, 282 U.S. 687, 691 (1931), or investigate prior acts that might undermine his veracity, Fed. R. Evid. 608(b), or develop other impeachment evidence, *see Alford*, 282 U.S. at 691-92.

The ability of the defense to investigate Avi was particularly critical because he testified as an expert. "Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). This latitude, coupled with an expert's aura of authority, creates the potential for "powerful and quite misleading" testimony. *Id.* at 595. One of the most effective means of countering the "misleading" impact of such testimony is to show that the purported expert has misstated his experience, education, or training.[21] That line of attack was foreclosed here; the defense could not even begin to investigate these matters without knowing Avi's name. It was forced to accept his account of his credentials and expertise with no meaningful ability to challenge his claims. This was particularly so because Avi has published no scholarly work in peer reviewed journals and has given no public lectures, and thus has never been subject to any scholarly critique--or at least none that the defense could find without knowing his name. *E.g.*, 7 R.7855, 8275-77.

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[21] There are many such cases. *See, e.g., Drake v. Portuondo*, 553 F.3d 230, 235-39 (2d Cir. 2009); *United States v. Ingram*, 1999 U.S. App. LEXIS 6074 (7th Cir. Mar. 23, 1999); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1381, 1384 (11th Cir. 1988); *Vincent v. Omniflight Helicopters Inc.*, 2009 U.S. Dist. LEXIS 117966 (E.D. Wis. Nov. 24, 2009). If the witnesses in these cases had remained anonymous, their misrepresentations would never have come to light.

The panel concluded that the defense had enough information with which to cross-examine Avi. Op. 20-21. But all the information that the defense had about Avi's background, training, and associations *came from Avi himself.* Avi retained "sole control over the informational flow," and appellants could not "test the veracity or completeness of the Government's [and Avi's] disclosures." *Fuentes*, 988 F. Supp. at 866. It is fundamentally inconsistent with the adversarial system to leave the ability to investigate a witness--particularly an expert witness--in the sole control of the witness and the party presenting him. Such a procedure gives the witness a license to lie (or exaggerate) with impunity.

It makes no sense, moreover, to say the defense had "enough" information without knowing what other information exists. Assume, for example, that Avi testified falsely about his experience or credentials. The significance of that impeachment would have dwarfed the other means appellants had to challenge his credibility. Or suppose Avi lives in a West Bank settlement and shares the views of Israeli extremists that all of the West Bank belongs to Israel. That too would have provided far more powerful impeachment than a general claim of bias arising from Avi's association with the GOI. Appellants, of course, cannot specify the actual impeachment information they would have found with Avi's name, but the law does not require them to shoulder that impossible burden. "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Alford*, 282 U.S. at 692.

The panel asserts that because Avi claims to use a pseudonym in his work for the ISA (a claim, of course, that we must take on faith), the defense would not have been able to learn anything about him even with his name. Op. 21-22. That is wrong. If Avi went to law school, as he asserted in his testimony, he did so under some name other than "Avi." He lives somewhere, has a life separate from his work, and is known to his community by a name other than "Avi." Whatever that name is, the defense needed it to develop information that could have been used to expose his bias and to undermine his self-proclaimed expertise.

The panel decision ultimately rests on the view that the government's interest in secrecy outweighs appellants' rights to due process and confrontation. Op. 18-19. The decision thus trivializes the right the Supreme Court characterized in *Smith* as "the very starting point in exposing falsehood and bringing out the truth," 390 U.S. at 131 (footnote and quotation omitted), the denial of which "calls into question the ultimate integrity of the fact-finding process," *Kittelson v. Dretke*, 426 F.3d 306, 319 (5th Cir. 2005) (quotation omitted). The Supreme Court recently abandoned an equally amorphous and subjective balancing test in another Confrontation Clause context. *See Crawford v. Washington*, 541 U.S. 36, 63-64 (2004) (rejecting the *Ohio v. Roberts* balancing test for determining the reliability of out-of-court statements). Like the right to cross-examine at issue in *Crawford* and the right to face-to-face confrontation at issue in *Coy v. Iowa*, 487 U.S. 1012 (1988), the right to know the names of one's accusers is too fundamental to be balanced away in service of some asserted government interest.[22]

The panel decision also flouts the principle that the Supreme Court established more than a half-century ago: "[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Reynolds*, 345 U.S. at 12; *see, e.g., United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (L. Hand, J.) ("[T]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished [is] greater than the disclosure of such 'state secrets' as might be relevant to the defence."). The

[22] The panel drew its balancing test from *Roviaro v. United States*, 353 U.S. 53 (1957). Op. 18. But *Roviaro* involved disclosure of the identity of a *confidential informant*, not of a *trial witness*--and certainly not of an *expert*. There is not a word in *Roviaro* that even hints that the prosecution can conceal the identity of any trial witness, much less an expert witness. It is telling that *Smith*, decided eleven years after *Roviaro*, does not cite that case.

panel decision permits the government to do exactly what *Reynolds* forbids: "undertake prosecution" and then invoke national security to "deprive the accused" of information that *Smith* deemed essential to the defense.

The panel decision would be wrong even if Avi had been the only expert available to the prosecution to address the zakat committees. But the government noticed Col. Fighel to cover precisely the same subjects. According to the government's notice, Col. Fighel was prepared to testify

> about each zakat committee listed in the [expert] notices. He will explain, based upon his research which he conducted in preparation for his testimony, how each committee is controlled by Hamas. He will testify about the committee members involvement in Hamas and how the acts of the committees were designed to support the terrorist organization.

10 R.2885; *see* 2 R.977. These are the very matters about which Avi testified. Col. Fighel's identity is not classified, and the defense was able to investigate his training, experience, and background much as it could any other expert.

The panel's "balancing" of interests gave no weight to Col. Fighel's availability. Israel provided the prosecution with two expert witnesses, one whose name was classified and one whose name was public. The panel concluded, in effect, that the prosecution's tactical preference for the classified Israeli expert (who could not be investigated) over the unclassified Israeli expert (who could be) outweighed appellants' rights of confrontation and due process. It cannot be the law that the government's choice of one expert over another trumps the accused's right to know the identity of the witnesses against him. The panel's contrary conclusion marks a steep descent from the lofty principles of *Smith* and *Reynolds*.

III. THE EN BANC COURT SHOULD ABANDON THE "LAWFUL JOINT VENTURE" VARIANT OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE.

Rule 801(d)(2)(E) defines as nonhearsay "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E); *see, e.g., Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Under this provision, the district court admitted dozens of documents seized from Elbarasse and Ashqar, all of which pre-dated the designation of Hamas in 1995. The government could not establish the existence of a "conspiracy" when the documents were created, because (in the government's words) conspiracy requires "an agreement among two or more people basically to do something wrong," 7 R.9508,[23] and "it didn't become illegal to support Hamas or to fund Hamas until 1995," 4 R.3563. The district court thus admitted the documents under the so-called "lawful joint venture" theory, by which some courts have extended Rule 801(d)(2)(E) to include statements in furtherance of even *lawful* common action. The panel affirmed the district court's ruling. Op. 36-39.

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[23] *See, e.g., Beck v. Prupis*, 529 U.S. 494, 501-02 (2000) (civil conspiracy); *Iannelli v. United States*, 420 U.S. 770, 777 (1975) (criminal conspiracy); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1194 (5th Cir. 1995) (civil conspiracy; applying Texas law); *United States v. Burroughs*, 876 F.2d 366, 370 (5th Cir. 1989) (criminal conspiracy).

For several reasons, the en banc Court should reject the lawful joint venture theory. First, by its plain terms Rule 801(d)(2)(E) applies only to a "*coconspirator* of a party during the course and in furtherance of *the conspiracy*." Fed. R. Evid. 801(d)(2)(E) (emphasis added). Both the common law roots of Rule 801(d)(2)(E) and its legislative history confirm that it uses the term "conspiracy" in its ordinary sense, to mean an agreement to achieve unlawful ends. Only by ignoring the text of the rule and its history can "conspiracy" be read to include *lawful* joint ventures. *See* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581, 599-608 (2010).

Second, the expansive lawful joint venture theory conflicts with the Supreme Court's directive that the co-conspirator exception be narrowly interpreted. The Court has recognized that "[t]here are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another." *Krulewitch*, 336 U.S. at 443. The *Krulewitch* Court thus resisted a government effort (far less sweeping than the lawful joint venture theory) to "expand this narrow exception to the hearsay rule" and "create . . . a further breach of the general rule against the admission of hearsay evidence." *Id.* at 444. Citing *Krulewitch*, the Advisory Committee Note to Rule 801(d)(2)(E) declares that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established."

Fed. R. Evid. 801, Advisory Committee Note; *see* Trachtenberg, *supra*, 61 Hastings L.J. at 627-29. The lawful joint venture theory dramatically expands the co-conspirator exception squarely in the teeth of these directives.

The Court should be particularly reluctant to expand the co-conspirator exception through the agency "fiction" because "[c]oconspirator statements do not possess the special trustworthiness characteristic of evidence falling within a firmly rooted hearsay exception." *United States v. Pecora*, 798 F.2d 614, 628 (3d Cir. 1986) (quotation omitted); *see, e.g., United States v. Morrow*, 39 F.3d 1228, 1235 (1st Cir. 1994) (noting that "[a]rguably, the co-conspirator hearsay exception is an historical anomaly, there being nothing especially reliable about such statements"); Fed. R. Evid. 801(d)(2), Advisory Committee Note ("No guarantee of trustworthiness is required in the case of an admission."). The lawful joint venture variant thus opens the door to evidence that may well be unreliable and cannot be tested through "the greatest legal engine ever invented for the discovery of truth." *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion) (quotation omitted).

Third, if the lawful joint venture theory depends on "concepts of agency and partnership law," as courts adopting it have suggested, *e.g., United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006); Op. 39, then it should be measured by the hearsay exception directed specifically to an agency relationship, Fed. R. Evid. 801(d)(2)(D). That provision defines as nonhearsay "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Rule 801(d)(2)(D) precisely defines the extent to which statements of agents may be treated as admissions by their principals. *See, e.g., United States v. Richards*, 204 F.3d 177, 202-03 (5th Cir. 2000); *United States v. Saks*, 964 F.2d 1514, 1525 (5th Cir. 1992). Courts should not distort Rule 801(d)(2)(E) to circumvent the restrictions that Congress placed on such vicarious admissions in Rule 801(d)(2)(D).

Other than the panel decision, three of this Court's cases--*United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), *United States v. Saimento-Rozo*, 676 F.2d 146 (5th Cir. 1982), and *United States v. HLF*, 624 F.3d 685 (5th Cir. 2010)--apply the lawful joint venture theory under Rule 801(d)(2)(E). None of those decisions offers a persuasive rationale.

The sole support *Postal* cites for the proposition that "the agreement [between the defendant and the declarant] need not be criminal in nature" is the following sentence from the Senate Report accompanying Rule 801(d)(2)(E): "'While [this] rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for purposes of this rule even though no conspiracy has been charged.'" 589 F.2d at 886 n.41 (quoting S. Rep. No. 1277, 93d Cong., 2d Sess. 24, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7073); *see* Op. 37

(quoting this portion of *Postal*). But the quoted statement means only that "despite the explicit inclusion of the word 'conspiracy' in [Rule 801(d)(2)(E)], the drafters did not intend to limit the scope of the [rule] to charged conspiracies. Under Rule 801(d)(2)(E), a 'conspiracy' may be uncharged, but it still must be a conspiracy." Trachtenberg, *supra*, 61 Hastings L.J. at 607; *see id.* at 607-08 (cases cited in Senate Report to support the quoted sentence all involve *illegal* joint enterprises); *United States v. Elashi*, 554 F.3d 480, 503 (5th Cir. 2008) (uncharged conspiracy suffices for Rule 801(d)(2)(E)).

Saimento-Rozo adds nothing to the inadequate *Postal* rationale. The Court observed in passing--citing only *Postal*--that the "conspiracy or agreement" underlying Rule 801(d)(2)(E) need not be "criminal in nature; it may be in the form of a joint venture." 676 F.2d at 149. And the recent *HLF* decision cites *Saimiento-Rozo* and cases from the Seventh and Ninth Circuits, but does not discuss the basis or correctness of the lawful joint venture theory. *See* 624 F.3d at 694.[24] In short,

[24] In its brief, the government cited out-of-circuit cases in support of the lawful joint venture theory. G.Br.75-76. Some of those decisions--such as *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006)--are wrongly decided, for the reasons outlined above. Other cases--such as *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917), and *United States v. Coe*, 718 F.2d 830, 835-36 (7th Cir. 1983)--address whether it is necessary to show the illegality of the agreement by evidence other than the statements themselves, not whether the agreement must have an unlawful object. *See* Trachtenberg, *supra*, 61 Hastings L.J. at 616-17. And still other cases--such as *United States v. Russo*, 302 F.3d 37, 45 (2d Cir. 2002), and *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988)--mention the lawful joint venture theory in dictum.

none of these cases provides a persuasive argument for upholding an evidentiary theory that is contrary to the language and legislative history of Rule 801(d)(2)(E) and opens the door to out-of-court statements that have no guarantees of trustworthiness and that the defendant cannot cross-examine.

The en banc Court should reject the "lawful joint venture" theory and apply Rule 801(d)(2)(E) as it was intended. Because appellants and the declarants in the pre-1995 documents were not engaged in any "conspiracy" when the declarants prepared the documents, Rule 801(d)(2)(E) does not apply and the documents should have been excluded as hearsay.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc. On rehearing, it should reverse appellants' convictions.

DATED: January 4, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th of January, 2012, a copy of the foregoing was filed using the Court's ECF system, which will serve counsel for all other parties to the case.

/s/ John D. Cline
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